IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 96 OF 2013

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MANDIA, J.A.)

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

FARID HADI AHMED & 9 OTHERS..... RESPONDENTS

(Appeal from the Ruling of the High Court of Zanzibar at Vuga)

(Mwampashi, J.)

In

Criminal Application No. 4 of 2012

JUDGMENT OF THE COURT

25th October & 20th November, 2013

RUTAKANGWA, J.A.:

On 25th October, 2012 the appellant instituted criminal proceedings in the High Court of Zanzibar at Vuga (**vide** Criminal Case No. 09 of 2012) against eight accused persons (the accused). These were Farid H. Ahmed, Mselem A. Mselem, Mussa J. Issa, Azan K. Hamdan, Suleiman J. Suleiman, Khamis A. Suleiman, Hassan B. Suleiman and Ghalib A. Omar. All the accused were facing three counts, namely Sabotage (1st count), Soliciting,

Inciting and Persuading Persons to commit an offence (2nd count) and Conspiracy to commit a felony (3rd count). In addition, Azan K. Hamdan, was being singly arraigned with "*Conduct conclusive (sic) to breach to peace*" (4th count). The 1st and 2nd counts were laid under sections 3 (a) and 11 respectively of the National Security Act, Cap 47 R.E. 2002. The 3rd and 4th counts were brought under sections 399 and 74(1) (b) respectively of the Zanzibar Penal Act, No. 6 of 2004.

The accused made their first appearance in the High Court on the same day before George Kazi, the Registrar of the High Court. The information was read over and explained to the accused persons. All the same, the accused's pleas on each count were not taken as the presiding officer had no jurisdiction to record their pleas. He was not a judge and he so plainly informed the accused.

Although the Registrar had clearly informed the accused persons that he was not a judge, each accused person, one after the other, applied orally to be granted bail. The application for bail was opposed by the Public Prosecutor, Ms. Raya Mselem, learned State Attorney. The prosecutor had two reasons in resisting the application. One, the Registrar did not have jurisdiction to entertain the bail application at all. Two, the

Director of Public Prosecutions (now appellant) had filed a *"Certificate of Bail Objection"* in terms of s. 19 (1) and (2) of the National Security Act. The accused pressed the learned Registrar to accede to their prayer insisting that they were innocent and they had a right to bail. The learned State Attorney was adamant. She maintained that the learned Registrar had no power to grant bail to the accused, asserting in conclusion that:-

> *"It is only a judge of the High that have (sic) power to entertain this application."*

The learned Registrar gave his ruling on the contested matter on the same day. Relying on a **verbal** Practice Directive allegedly given by the Zanzibar Chief Justice in 2004, the learned Registrar ruled that he had undoubted jurisdiction to entertain and determine the application for bail. He literally questioned the **bona fides** of Ms. Mselem, *"who had raised the objection."* Having thus resolved the issue of his jurisdiction, the learned Registrar proceeded to, borrowing his own words, *"board on the next issue of whether accused persons are entitled to be granted bail"*. For the sake of brevity and clarity we have found it convenient to state that after considering the provisions of s. 19(1) and (2) of the National Security Act, he was of the settled view that the right of the accused to bail had been

"curtailed" by the *"certificate of bail objection"*. He accordingly dismissed the bail application. He ordered the accused persons to be remanded in custody *"until when their case will be heard and finally determined or when the D.P.P decided to withdraw a certificate of bail objection"*.

The accused, who by then were fending for themselves, were aggrieved by that ruling. Acting through Mr. Rajab Abdalla Rajab, learned advocate, they on 20th December, 2012, instituted Criminal Application No. 4 of 2012 in the same High Court. The application was by Chamber Summons under section 3(1) (a) of the High Court Act No. 2 of 1985 and section 150(1) of the Criminal Procedure Act No. 7 of 2004 (the CPA). In the application, the accused were seeking mainly a **review** of the Registrar's ruling dated 25th October, 2012 which they claimed contained *"errors apparent on the face of the record,"* and further, the nullification of the D.P.P.'s certificate of bail objection. They also sought bail on *"lenient and reasonable conditions."* The chamber summons was supported by an affidavit of one Abdalla Juma Mohamed, learned advocate.

The appellant, as respondent in the application, resisted the application. He also challenged its competence and accordingly lodged a

notice of preliminary objection. The notice of preliminary objection cited two points of law, namely:-

(a) that the High Court had not been properly moved, and

(b) that the application was incurably defective.

The application was heard by Mwampashi, J. on 28th February, 2013. By this date, it is worth noting here, the D.P.P. had already, on 3rd January 2013, filed fresh information containing the same four counts, but with two additional accused persons, namely, Abdalla S. Ali and Fikirini M. Fikirini. Furthermore, the subject of the 4th count was no longer Azan K. Hamdan but Farid H. Ahmed. The D.P.P. had also simultaneously filed another *"certificate of bail objection"* in respect of these two accused persons.

Before Mwampashi, J. it was counsel for the applicants, Mr. Abdalla Juma, who first addressed the court pressing for review of the Registrar's ruling. He impressed upon the learned Judge that the applicants were entitled to a review order as the Registrar, being not a High Court judge, *"had no powers to entertain the bail application."* He also told the learned judge that prohibition to granting bail under s. 19(1) and (2) of the National Security Act *"is directed to police officers and not the court".*

In response, Mr. Ramadhani Nassib, learned State Attorney, for the D.P.P., first addressed the learned judge on the merits of their objection to the competence of the application. He submitted that the cited enabling provisions did not *"enable the applicants to bring the application before the Court."* He was emphatic in his submission that those powers do *"not give the powers to"* the *"Court to entertain the application"*. It was his strong submission that if the applicants had been aggrieved by the ruling of the Registrar who had no jurisdiction to entertain the bail application, they ought to have proceeded under s. 389 of the C.P.A. He was equally vehement in his opposition to resort to s. 150(1) of the C.P.A as that provision can only be invoked by the court *suo motu.* More tellingly, the learned State Attorney strongly contended that the learned judge had no power to review the Registrar's ruling. It was only the Registrar who could review his own ruling, he concluded.

On the second point of objection, it was his submission that the application was based on an incurably defective affidavit. The supporting affidavit, he had argued, contained legal arguments and opinions and had to be expunged.

Coming to the merits of the application, Mr. Ramadhani only agreed with the applicants on their claims that the learned Registrar had no powers to entertain the bail application. But he parted company with them when it came to the issue of the validity of the certificate of bail objection. It was his contention that *"it binds and prohibits the court from granting bail to the applicants".*

The rejoinder submission of Mr. Rajab A. Rajab, learned advocate, was focused and for our purpose removed any lingering ambiguity concerning the nature of their application. He said, and we find it instructive to quote him:-

> *"**Our application is all about review of the Registrar ruling** who presided over the High Court case. We do not apply for revision or reference." [Emphasis is ours].*

Regarding the issue of wrong citation he confidently asserted:-

> *"...we do submit in reply that since we all agree that there are no specific provisions on how review can be brought before the High Court in criminal matters then the cited provisions are proper... **we are not seeking for any writ but for review."***
>
> [Again emphasis is ours].

In his apparently detailed ruling the learned High Court judge had no flicker of doubt on the competence of the application for review before him. He was of that settled view because as he found it, neither the C.P.A. nor any other Zanzibar law provided *"how a decision by the High Court Registrar in a criminal matter triable by the High Court can be challenged."* *"Because of this anomaly",* he went on to reason, he could not come to terms with the contention that the application was not properly before him.

On who was the appropriate authority to review the Registrar's ruling, the learned judge disagreed with the argument of Mr. Ramadhani Nasib to the effect that it was the Registrar himself. Since the Registrar had *"firmly held that he"* had jurisdiction to entertain the bail application in the High Court case and *"also that the court is barred to grant bail by the D.P.P certificate,"* he found *"no good reasons for the same issues"* to be taken *"before him again for review".* He accordingly dismissed the two points of preliminary objection and proceeded to determine the application for review on merit.

In his considered ruling the learned judge was in concurrence with counsel for both sides in the application, that the Registrar of the High Court had no jurisdiction to hear and determine the applicants' bail

application. He accordingly nullified, quashed and set aside the bail proceedings before the Registrar and his decision thereon. The learned judge made other findings in his ruling which are not relevant to this appeal. We see no good reason to discuss them here.

The D.P.P. was dissatisfied with the ruling of the learned High Court judge which was delivered on 11th March 2013. On 12th March, 2013 he lodged a notice of appeal, and the memorandum of appeal was lodged on 15th April, 2013. The memorandum of appeal lists only two grounds of complaint against the ruling of the learned High Court judge. They are as follows:

> "(a) *That the Honourable Judge erred in law to allow application without enabling provision.*
>
> *(b) That the Honourable Judge erred in law and fact to entertain and determine review which he had no jurisdiction."*

Long before the appeal was scheduled for hearing, the respondents lodged a notice of preliminary objection, challenging the competence of the appeal. This challenge is predicated on two grounds. One, the purported appeal is not maintainable. It is barred by section 5(2) (d) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the Act). Two, the notice of appeal

and the memorandum of appeal are not in conformity with the High Court impugned ruling.

Following the settled salutary rule of practice when the appeal was called on for hearing we first heard oral submissions of counsel for both sides on the preliminary objections and reserved our ruling thereon. We proceeded to hear the submissions in support of and against the appeal and reserved our judgment. This judgment, therefore, contains our reasoned decisions on both aspects of the appeal. We should note in appreciation from the outset that both the written and oral submissions of counsel for both parties, were brief, focused and objectively presented. Alive to their obligation to assist the Court in reaching a fair and just decision, they did not argue for the sake of argument. They readily conceded the obvious where others would have put up uncalled for stiff resistance. We are grateful to them all.

At the hearing, the appellant was represented by Ms. Fatma A. Hassan, Mr. Abdalla I. Mgongo and Mr. Ally R. Ally, learned State Attorneys. Mr. Salim Toufiq, Mr. Abdalla J. Mohamed, Mr. Rajab A. Rajab and Mr. Suleiman S. Abdalla, learned advocates, represented the

respondents. The respondents who appeared before us were the first eight (8) accused persons.

It was Mr. Toufiq's contention in support of the first point of preliminary objection that inasmuch as the case against the accused is still pending in the High Court the impugned ruling was an interlocutory one. For this reason, he argued, the appeal ought to be struck out as it is barred by s. 5(2) (d) of the Act as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2002 [Act No. 25 of 2002]. He cited as authority, our decision in **Yohana Nyakibari & 22 others,** Criminal Reference No. 1 of 2006 (unreported).

Regarding the second point of objection Mr. Toufiq gallantly argued that whereas the challenged High Court ruling was in respect of only eight (8) accused persons, the notice of appeal is defective so long as it cites *"Farid Hadi Ahmed and 9 others".* The defect, Mr. Abdalla added, rendered the appeal incompetent.

Responding to these challenges Ms. Fatma confidently asserted that the appeal having been *"instituted by the D.P.P and no other person",* is competent and maintainable. She premised this uncompromising stand on

s. 6(2) of the Act, which she stressed was not affected by the amendments introduced by Act No. 25 of 2002. She relied on the decisions of this Court in **Seif Shariff Hamad v. S.M.Z.,** [1992] T.L.R. 43 and **Joseph Chuwa v. R.** Criminal Appeal No. 75 of 2006 (unreported).

On the second point of objection, Ms. Fatma argued that both the notice of appeal and the memorandum of appeal relate to the ruling of Mwampashi, J. dated 11/3/2013 and was for all intents and purposes in conformity with the essential requirements of Rule 68 of the Tanzania Court of Appeal Rules, 2009 (the Rules). She accordingly pressed for the dismissal of the preliminary objections.

After carefully reading sections 5 and 6 of the Act, Rule 68(2) of the Rules (on the contents of a notice of appeal) and digesting counsel's submissions, we are of the settled opinion that the two points of objection need not necessarily detain us. They are rooted, we respectfully hold, on a misapprehension of the statutory provisions on which they are premised. To vindicate this our stance, we have found it illuminating to reproduce the whole of sections 5(2) and 6 of the Act.

Section 5 of the Act, which caters for appeals to this Court in civil cases only from the High Court and subordinate courts with extended powers, provides as follows:-

> "5-(2) *Notwithstanding the provisions of subsection (1)*
>
> *(a) except with the leave of the High Court, no appeal shall lie against*
>
> *(i) any decree or order made by the consent of the parties; or*
>
> *(ii) any decree or order as to costs only where the costs are in the discretion of the High Court;*
>
> *(b) except with the leave of the Court of Appeal, a party who does not appeal against a preliminary decree shall not dispute its correctness in an appeal against the final decree;*
>
> *(c) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Court Act unless the High Court certifies that a point of law is involved in the decision or order;*
>
> *(d) No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit."*

The whole of section 6 reads thus:

"6(1) *Any person convicted on a trial held by the High Court or by a subordinate court exercising extended powers may appeal to the Court of Appeal.*

(a) where he has been sentenced to death, against conviction on any ground of appeal; and

(b) in any other case –

(i) against his conviction on any ground of appeal; and

(ii) against the sentence passed on conviction unless the sentence is one fixed by law

(2) *Where the Director of Public Prosecutions is dissatisfied with any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers he may appeal to the Court of Appeal against the acquittal, sentence or order as the case may be, on any ground of appeal.*

(3) Where, in proceedings under the provision to subsection (1) of section 26 of the Penal Code relating to the conviction of a woman who is pregnant, the High Court or a subordinate court exercising extended powers has found that the woman in question is not pregnant, the woman may appeal to the Court of Appeal against the finding.

(4) An appeal shall lie to the Court of Appeal against any directions of the High Court or of a subordinate court exercising extended powers for the release of a person detained in proceedings for those directions in the nature of habeas corpus under section 390 of the Criminal Procedure Act against a refusal to give those directions.

(5) An appeal shall lie to the Court of Appeal from any order of the High Court awarding costs under section 350 of the Criminal procedure Act and the Court of Appeal shall have power to award the costs of the appeal as it shall deem reasonable

(6) Any person sentenced by the High Court in pursuance of the provisions of section 171 of the Criminal Procedure Act may appeal to the Court of Appeal against the sentence, unless it is one fixed by law; but if the High Court imposes a sentence which the court which committed the offender had power to impose no appeal shall lie against such sentence

(7) Either party –

(a) to proceedings under Part X of the Criminal Procedure Act may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact;

(b) to proceedings of a criminal nature under Head (c) of Part III of the Magistrates' Courts Act, may if the High Court certified that a point of law is

involved, appeal to the Court of Appeal, but where the order appealed against is a declaratory order, the determination of the Court of Appeal on it shall also have effect only as a declaratory order."

It must be obvious to all now that in the entire section 6 which clothes this Court with jurisdiction to hear and determine criminal appeals from the High Court and subordinate courts with extended powers, there is no provision similar to, leave alone one identical with s. 5 (2) (d) reproduced above. For this very obvious reason, we have found ourselves constrained to accept without any demur, Ms. Fatma's irresistible contention that the right of the D.P.P. to appeal against *"any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers",* was left unfettered by the total prohibition against appeals or revision applications to this Court in relation to any preliminary or interlocutory decision or order. This conclusion finds strong support from the observation of this Court in the case of **Yohana Nyakibari** (supra), in respect of the reasons behind the passing of Act No. 25 of 2002.

In **Yohana Nyakibari's** decision dated 15/8/2007 the Court made this apt observation;

> *"At this juncture it may be observed briefly that the intention of the legislature in enacting the law under the Act, was to ensure speedy expedition of trials particularly with regard to civil suits. Hence the amendments effected under the Act of section 5(2) (d) of the Appellate Jurisdiction Act, 1979, section 74 of the Civil Procedure Code 1966 and section 43 of the Magistrate courts Act, 1984."*

To this list, we may as well justifiably add sections 78 and 79 of the same Civil Procedure Code. This list of amended sections has led us to the conclusion that s. 6(2) of the Act was by design left untouched by Parliament.

In the face of these unambiguous provisions of s. 6 of the Act, we respectfully hold that the first point of preliminary objection premised on a statutory provision not related to appeals in criminal cases, as is the appeal under scrutiny, is totally misconceived. It is accordingly overruled. All other things being equal, the appeal ought to be held competent.

In disposing of the second point of objection we shall begin by agreeing with the appellant, that the notice of appeal on record is

substantially in the form B in the First Schedule to the Rules. It contains all the essential requirements of Rule 68 (2) of the Rules. The admitted fact that it is shown therein that the respondents in the appeal are **"Farid Hadi Ahmed and 9 Others"** is in our considered view, an unavoidable reflection of the true state of affairs. It is common ground that this appeal has its origin in Criminal Case No. 09 of 2012 of the Zanzibar High Court at Vuga.

The bane of both the appellant and respondents in this appeal are the ruling and orders of the High Court Registrar which were admittedly given in that case. There is no gainsaying here that this case is still pending in the High Court. It is equally undisputed that by the time Mwampashi, J. heard and determined the application which gave rise to the ruling, the subject of this appeal, the accused persons in the case were ten (10) in number. Therefore, the notice of appeal in citing 10 respondents leaves no remote doubt as to the true identity of the case which is still pending and upon whose existence the first point of objection was pegged. For this reason we hold that the notice of appeal is not defective at all. Indeed the notice of appeal would have been equally valid

by citing *"Farid Ahmed & Others".* The second point of preliminary objection should in the interest of justice, be overruled as we hereby do.

Having overruled the points of preliminary of objection, it behoves us now to dispose of the appeal itself. We shall canvass the 2nd ground of appeal first as on the face of it, if allowed, it is capable of conclusively determining the appeal.

As already shown, the appellant is reproaching the learned High Court judge with clothing himself with the powers to review the ruling of the learned High Court Registrar. It is the appellant's contention that the learned judge had no such jurisdiction and we are therefore, being called upon to nullify the entire proceedings in the High Court.

In disposing of this crucial ground of appeal, we have found it instructive to begin by stating categorically that it is now trite law that the issue of jurisdiction for any court is basic. As this Court succinctly stated in **Fanuel Mantiri Ng'unda v. Herman M. Ng'unda and Others**, Civil Appeal No. 8 of 1995 (unreported), *"it goes to the very root of the authority of the court to adjudicate upon cases of different nature".* The Court went on to hold that *"the question of jurisdiction is so fundamental"*

such that "it is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case". We are accordingly of the settled view that jurisdiction to adjudicate must not be presumed or taken for granted. It must be traced to unequivocal statutory provisions and in some rare cases from the Constitution: See also, **Richard Julius Rukambura v. Issack N. Mwakajila and Another** (CAT) Civil Appeal No. 3 of 2004, **Baig and Batt Construction Ltd. V. Hasmati Baig** (CAT) Civil Appeal No. 9 of 1992 (all unreported), etc. Settled law is that proceedings entertained by a court or tribunal without jurisdiction, and a judgment, decision, ruling, etc. emanating from those proceedings, are all a nullity: see, **Tanzania Revenue Authority v Kotra Co. Ltd.** (CAT) Civil Appeal No. 12 of 2009 (unreported).

In the light of this clear stance of the law, we are now in a good position to canvass objectively the second ground of appeal. As we have already sufficiently demonstrated, the respondents were before the High Court seeking not judicial review of the Registrar's orders but a review of his ruling. In that case, we entertain no doubt that that application was totally misconceived.

As correctly argued by Mr. Mgongo before us, a review of that nature is only made or done by the very court which gave the decision or judgment. More often than not, that jurisdiction is exercised by the very magistrate or judge who rendered the judgment. This principle applies to both civil and criminal applications for review. Assuming without deciding here that the learned Registrar had the necessary jurisdiction to entertain and determine the respondent's bail application, he himself or his successor in office would have been the only person with jurisdiction to review the ruling dated 25th October, 2012. For this reason, we respectfully hold that the learned High Court judge erred in law in holding as he did that as the Registrar had conclusively decided the issues before him, he saw:

> *"no good reasons for the same issues to be brought before him again for review."*

In so holding, we most respectfully hold, he missed the true import or nature of the review of judgment process.

For the above conclusion, we find support from previous judgments of the Court. In **Richard Rukambura's** case (*supra*), for instance, the Court lucidly stated thus: -

> *"...the question of jurisdiction is fundamental in court proceedings and can be raised at any stage, even at the appeal stage. The court* ***suo motu*** *can raise it. In* ***Baig and Batt Construction Ltd v Hasmati Ali Baig ...*** *this Court raised* ***suo motu*** *in an appeal to it, the question of the High Court not having jurisdiction to hear a review case regarding an order made by the District Registrar. It said the judge of the High Court had no jurisdiction, as only the District Registrar could review the order he had made earlier..." (Emphasis is ours.)*

Need we say more? We believe not. We are convinced that this tells it all, lest we be reproached with over-egging the pudding. On the basis of these authorities we hold that the proceedings before Mwampashi, J. were totally misconceived. The learned judge, therefore, we respectfully hold, had no jurisdiction to hear and determine the application for review. It was the Registrar who could review his own ruling. We accordingly allow the second ground of appeal.

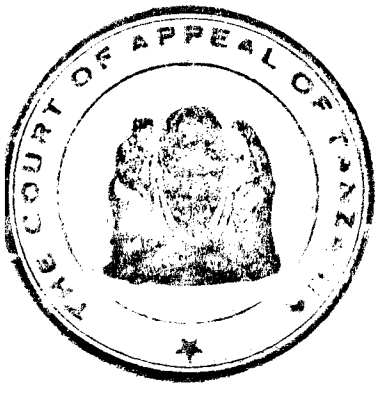
Having conclusively held that the learned High Court judge had no jurisdiction to entertain the review application, we hereby nullify, quash and set aside the entire proceedings before him as well as his ruling which

gave rise to this appeal. The respondents are at liberty to take other remedial measures available in law if they are still aggrieved by the ruling and orders of the learned High Court Registrar.

Taking into consideration our decision on the second ground of appeal, we find no compelling reason to canvass the first ground of appeal. That would be a futile academic exercise. It will await another fitting occasion. Once it is accepted, as we have done, that the learned judge had no jurisdiction, then the issue that he was improperly moved does not arise.

All said and done, we allow this appeal.

DATED at DAR ES SALAAM this 12th day of November, 2013.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL